Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
JERRY SZOKA	)	CIB Docket No. 98-48
Cleveland, Ohio	)	
	)	
Order to Show Cause Why	)	
A Cease and Desist Order	)	
Should Not Be Issued	)	

Appearances

Hans Bader and James A. Moody on behalf of Jerry Szoka; and Pamera D. Hairston and W. Riley Hollingsworth on behalf of the Compliance and Information Bureau.

DECISION

Adopted: June 10, 1999 ; Released: June 15, 1999

By the Commission:

I. INTRODUCTION

1. In this Decision, the Commission affirms the Summary Decision ("S.D") of Chief Administrative Law Judge Joseph Chachkin ("ALJ"). FCC 98D-3, released September 4, 1998, which orders Jerry Szoka to cease and desist from operating an unauthorized broadcast station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301, prohibiting radio communications without a license, and imposes a monetary forfeiture of $11,000 for operating in violation of Section 301.

2. In an Order to Show Cause and Notice of Opportunity for Hearing ("OSC"), 13 FCC Rcd 10630 (1998), the Commission directed Szoka to show cause why he should not be ordered to cease and desist from violating Section 301 and designated the following issues for hearing:

> To determine whether Jerry Szoka has transmitted radio energy without appropriate authorization in violation of Section 301 of the Act.
>
> To determine whether, based on the evidence adduced pursuant to the preceding issue, Jerry Szoka should be ordered to cease and desist from violating Section 301 of the Act.

The OSC also called for a determination, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), of whether an order of forfeiture in an amount not to exceed $11,000 should be issued against Szoka for violations of Section 301.[1]

3. In the S.D., the ALJ summarily resolved the factual issue against Szoka on the basis of the Compliance and Information Bureau's June 10, 1998 Motion for Summary Decision and ordered him to cease and desist from violating Section 301. Additionally the ALJ concluded that Szoka's misconduct warranted a forfeiture in the amount of $11,000. By Memorandum Opinion and Order, FCC 98M-113, released September 4, 1998, the ALJ also denied Szoka's August 4, 1998 Motion to Enlarge Issues. Szoka has filed exceptions to the ALJ's rulings, and the Bureau has filed a reply.

II. BACKGROUND

A. Findings

4. Szoka is the owner and/or operator of "The Grid," a nightclub located at 1281 West 9th Street, in Cleveland, Ohio. Szoka operates a radio station known as "The Grid" or "Grid Radio" at that address. The station has transmitted on 96.9 MHz, which is in the FM broadcast band (88 MHz to 108 MHz), from November 4, 1996 to the present. Szoka states that his station went on the air in September 1995 and now broadcasts seven days a week. I.D., ¶ 3; Bureau Motion for Summary Decision, Exhs. 1, 2; Szoka Opposition to Motion for Summary Decision, at 1.

5. Szoka does not hold an authorization from the Commission to broadcast on 96.9 MHz. After receiving information on November 4, 1996 concerning Szoka's unauthorized radio operation, James A. Bridgewater, the Detroit Field Office Director of the Compliance and Information Bureau, wrote warning letters to Szoka on February 20 and June 11, 1997. The letters informed Szoka that his operation of a radio station without a license violated Section 301 and could subject him to penalties including fine and/or imprisonment. Szoka did not cease his unauthorized operation after receipt of these letters. I.D., ¶ 4; Bureau Motion for Summary Decision, Exh. 3, Attachments A, C.

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[1]The forfeiture amount was determined by using the statutory base amount $10,000 for the violation at issue (construction and/or operation without an instrument of authorization for the service) which becomes $11,000 with the inflation adjustment pursuant to the Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321-358 (1996). The maximum statutory forfeiture is $11,000 for each day of a continuing violation up to a total of $82,500 for each act or failure to act. See 47 U.S.C. § 503(b)(2)(C); 47 C.F.R. §§ 1.80(b)(3), (b)(4), (b)(5).

6. On September 11, 1997, FCC agents made field strength measurements of the signal identified as "The Grid." These measurements, which were made at approximately 171 meters from the transmitting antenna, recorded a value of 35.55 millivolts/meter (33,550 microvolts/meter).[2] This emission far exceeds the limit set forth in 47 C.F.R. § 15.239(b), which contains the only pertinent exception to the prohibition on unlicensed operation in the FM frequency band. This rule allows unlicensed operation of a low power radio transmitter in the FM band, provided that the signal strength of any such transmission does not exceed 250 microvolts/meter at a distance of 3 meters. Szoka's signal could be heard for approximately 19 miles. On March 19, 1998, FCC agents confirmed that the station was still operating. I.D., ¶ 4 n. 3, ¶ 6; Bureau Motion for Summary Decision, Exh. 4.

B. The S.D.'s Conclusions

7. The ALJ concluded that summary decision was appropriate because there was no factual dispute requiring a hearing. He found that Szoka did not have a license to operate a broadcast station, that Szoka admitted operating a radio station in Ohio, and that he admitted using power in excess of that permitted for unlicensed operation in the FM band. The S.D. rejected Szoka's contention that he was not required to comply with Section 301 because the Commission's refusal to license broadcast stations under 100 watts violates his First Amendment rights and is inconsistent with the Commission's statutory mandate to regulate in the public interest. The ALJ also disagreed with Szoka that the proposed forfeiture of $11,000 was unconstitutionally excessive. The S.D. concluded that the forfeiture was warranted because Szoka's violations were willful and repeated, even in the face of explicit warnings from Commission officials.

C. Exceptions

8. Szoka challenges the S.D. on the principal grounds that the Commission's "regulatory ban on microbroadcasters" violates the First Amendment because it imposes a prior restraint or unjustified content-based regulation, that the Commission's "refusal to license microbroadcasters such as Szoka" also violates the statutory requirement that the Commission efficiently use the radio spectrum in the public interest, and that the forfeiture imposed by the ALJ in this case is unconstitutionally excessive as well as a violation of the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). Specifically Szoka argues that, although the Commission's rules currently ban "microbroadcasters" like himself,[3] he is serving the public interest by providing

[2]Szoka operates with an effective radiated power of 48.8 watts and at an antenna height of 80 feet HAAT. Szoka Opposition to Motion for Summary Decision, at 1 and Exhibit A.

[3]Szoka does not define microbroadcasting but appears to be referring to stations operating with less than 100 watts. The rules he cites, which he describes as "the Class D regulations,"

his audience with programming that is not available elsewhere, and the Commission therefore should reconsider its prohibition. Szoka asserts that he may challenge the Commission's regulations as applied to him, even though he never sought a license or a rule waiver, because any such application would have been futile and the regulations are constitutionally overbroad. Szoka also asserts that the Commission's ban is "essentially standardless," making it an unauthorized prior restraint in violation of the First Amendment. He argues that the regulations are not narrowly tailored and that there is available spectrum space to accommodate microbroadcasters. Szoka further maintains that the ban is too restrictive because it leaves him without ample alternative means of communicating with his audience, and that the waiver process is unduly burdensome for microbroadcasters. Next Szoka claims that the Commission's approach to microbroadcasting violates provisions of the Communications Act that require the Commission to maximize the number of users of the spectrum, eliminate gaps in coverage, and avoid unacceptable interference while guaranteeing diverse programming. With regard to the proposed forfeiture, Szoka claims that it violates the Eighth Amendment because it bears no relationship to the gravity of the offense. Szoka asserts that the forfeiture is so punitive that it violates his rights under the Fifth, Sixth, and Seventh Amendments as well. He also argues that SBREFA applies here because it requires federal agencies to reduce regulatory burdens on small businesses and provides for the reduction of civil penalties for violations of regulatory requirements. Finally he submits that he was entitled to a full hearing.

III. DISCUSSION

A. Procedural Rulings

9. Initially we agree with the ALJ that summary decision was appropriate in this case. Summary decision may be granted upon a showing that there is no genuine issue of material fact for determination at the hearing. 47 C.F.R. § 1.251(a)(1), (d); Big Country Radio, Inc., 50 FCC 2d 967 (Rev. Bd. 1975). The Communications Act precludes any person from transmitting radio signals within the United States without a license. 47 U.S.C. § 301. Under the Commission's rules, low power transmissions in the 88 to 108 MHz band are exempt from FCC licensing requirements if the field strength of the emissions does not exceed 250 microvlts/meter at a distance of 3 meters. 47 C.F.R. § 15.239(b). There is no dispute here that Szoka has been broadcasting on 96.9 MHz since at least November 1996 without a license in violation of 47 U.S.C. § 301 and is continuing to do so. It is also undisputed that Szoka's operation exceeds

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are 47 C.F.R. § 73.512(c) (except in Alaska, the Commission will not accept new applications from Class D noncommercial educational stations, which are defined as operating with no more than 10 watts); 47 C.F.R. § 73.211(a) (FM stations must operate with a minimum effective radiated power of 100 watts); and 47 C.F.R. § 73.511(a) (no new noncommercial educational station will be authorized with less than the minimum power requirement for Class A stations, which is 100 watts).

the permissible power limits specified in 47 C.F.R. § 15.239(b) for unlicensed facilities. Szoka has not shown what purpose a hearing would serve in these circumstances. Accordingly the ALJ correctly resolved the factual question of Szoka's unauthorized operation against him without the need for a hearing.[4]

10. The ALJ also correctly denied Szoka's motion to enlarge issues. Szoka filed his motion more than two months beyond the time specified in 47 C.F.R. § 1.229(a) for the filing of such motions, and he did not establish good cause for the delay in filing pursuant to 47 C.F.R. § 1.229(b)(3). Moreover, Szoka's motion did not raise a question of probable decisional significance and substantial public interest importance, which is the only ground for consideration of a motion to enlarge on the merits in the absence of good cause for late filing. See 47 C.F.R. § 1.229(c). Szoka simply listed eight issues he wanted to add to the proceeding without providing any specific allegations of fact sufficient to support the action requested, let alone any supporting affidavit, as required by 47 C.F.R. § 1.229(d). Additionally, as the ALJ observed, Szoka's motion largely raised legal issues, rather than factual ones that are appropriate for hearing. In any event, Szoka's arguments, both legal and factual, are duplicative of matters that either were raised in opposition to the motion for summary decision and considered by the ALJ in his S.D., or that are raised in Szoka's Exceptions and considered in this opinion.

B. Section 301 Violation

11. Szoka defends his violation of Section 301 by arguing that the Commission's rules barring unauthorized low power operations such as his violate the First Amendment and are inconsistent with our statutory mandate. We agree with the ALJ, however, that the Commission and the federal courts have considered and rejected similar, if not identical, arguments in other cases involving unlicensed broadcast operations. To begin with, the Commission has explained that Congress established a licensing system over 60 years ago in the Communications Act that requires any person who wishes to broadcast to submit an application in writing to the Commission, 47 U.S.C. § 308, and prohibits operation of a broadcast station without a license issued by the Commission. 47 U.S.C. § 301. A principal reason for requiring a license to broadcast is to prevent interference with broadcast signals so that the public may receive these signals. See Stephen Paul Dunifer, 11 FCC Rcd 718, 720 (1995); see also United States v. Dunifer, 997 F.Supp. 1235, 1241 (N.D. Cal. 1998), motion to alter or amend judgment denied, November 18, 1998, appeal pending, No. 99-15035 (9th Cir. 1999) (prohibition on unlicensed

[4]Szoka asserts that the summary decision format gave no consideration to his ability to pay the proposed forfeiture. We disagree that Szoka was precluded in any way from making such a showing to the ALJ in opposition to the Bureau's motion for summary decision. Nevertheless, in keeping with our recent forfeiture orders in other proceedings involving unauthorized operations of radio stations, cited at ¶ 22, infra, we will permit Szoka to submit a showing in support of any claim of inability to pay. See ¶ 26 n. 6, infra.

broadcasting is constitutional). Because the radio spectrum is not large enough to accommodate an unlimited number of users, "[w]here more than one broadcaster attempts to use the same radio frequency, interference results. Regulation therefore is essential to the orderly use of the nation's airwaves." United States v. Weiner, 701 F.Supp. 14, 16 (D. Mass. 1988), aff'd, 887 F.2d 259 (1st Cir. 1989).

12. As a constitutional matter, the Supreme Court repeatedly has affirmed that there is no First Amendment right to broadcast without a license and that the Commission has authority to regulate the radio spectrum. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."); National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943) ("The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce."); accord, FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 798-802 (1978) (citing Red Lion); Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 101 (1973) (citing Red Lion); see also Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 637 (1994) ("The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters."); Turro v. FCC, 859 F.2d 1498, 1500 n. 2 (D.C. Cir. 1988) (denial of request for waiver of rule prohibiting program origination by FM translator station "presents no First Amendment issues different from those raised by any other denial of authorization to broadcast"); Creation of a Low Power Radio Service, FCC 99-6, released February 3, 1999 at n. 16 (dismissing assertion that First Amendment guarantees individuals the right to operate a low power radio station).

13. Hence Szoka's contentions that he serves a niche audience that is not otherwise being served adequately by licensed broadcasters and that he has no alternative outlet for reaching his audience, even if valid, would not give him a right to broadcast without a license and in contravention of the Commission's rules. The same is true of Szoka's claim that there is sufficient spectrum space to accommodate microbroadcasters. See United States v. Weiner, 701 F.Supp. at 16 ("[E]ven if the [broadcast] band were 'empty,'" First Amendment would not provide "authority to broadcast . . . in violation of . . . federal . . . law"). Szoka also contends that he has made "every effort" to avoid interference with broadcast operations and that the Bureau has not alleged that his signal actually causes interference to licensed services. Exceptions at 3. As we have explained previously, however, the licensing requirement of Section 301 may be enforced without a specific showing that the unlicensed radio transmission in question causes harmful interference. See Stephen Paul Dunifer, 11 FCC Rcd at 727.

14. In view of the constitutionality of the Commission's licensing requirement, Szoka was obliged to apply for a license in accordance with the Communications Act together with a fully

supported request for waiver of the relevant rules that limit low power radio service. Id. at 721. Had he requested a waiver, and had his request been denied, he could have appealed to the United States Court of Appeals for the District of Columbia Circuit pursuant to 47 U.S.C. § 402(b)(1). Alternatively, Szoka could have petitioned for rulemaking, pursuant to 47 C.F.R. § 1.401, to alter the existing low power FM rules or to seek allocation of a channel that would permit operation at the power he sought. If his petition had been denied, he could have sought review in any court of appeals under 47 U.S.C. § 402(a). See Free Speech v. Reno, No. 98 Civ. 2680, slip op. at 8 (S.D.N.Y. March 18, 1999) (1999 WL 147743). Szoka did not seek a license or a rule waiver, however. As a consequence, he lacks standing to challenge the applicability to him of the regulations in federal court. See United States v. Neset, 10 F.Supp.2d 1113, 1115 (D.N.D. 1998); United States v. Dunifer, 997 F.Supp. at 1240.

15. Szoka maintains that it would have been futile for him to file a license application and a request for waiver because the Commission has made clear that it is unwilling to license microbroadcasters. We disagree with this view. The Commission is required to give serious consideration to an applicant's meritorious request for a rule waiver, including non-frivolous constitutional arguments presented to it. See Meredith Corp. v. FCC, 809 F.2d 863, 874 (D.C. Cir. 1987); WAIT Radio v. FCC, 418 F.2d 1153, 1156 (D.C. Cir. 1969). And, in fact, the Commission has granted waivers to low power broadcasters in the past. See Turro v. FCC, 859 F.2d at 1500 n. 1 (citing two such instances); see also United States v. Dunifer, 997 F.Supp. at 1240-41 (citing Turro and rejecting futility argument).

16. In any event, we disagree with Szoka that the Commission's rules prohibiting low power operation violate the First Amendment. Thus we disavow Szoka's view that the rules are overbroad and "standardless." Federal courts have rejected this contention in other cases. In WAIT Radio v. FCC, 418 F.2d at 1156-57, as noted above, the court of appeals held that, where the Commission denies an applicant's waiver request, it must give serious consideration to the request, including adequately supported and non-frivolous First Amendment claims. The court additionally stated that the Commission must "articulate with clarity and precision its findings and the reasons for its decisions." Id. Subsequent district court decisions have held that these mandatory judicial guidelines, within the context of the Commission's obligation to administer in the public interest, provide sufficient standards for the Commission to decide whether to grant or deny a waiver application, and, further, that the Commission's regulatory scheme sets forth adequate procedures for processing license applications and waiver requests, and it provides for judicial review of any improper Commission ruling. Therefore these courts have concluded that the regulations are not overbroad. See United States v. Dunifer, 997 F.Supp. at 1243-44; United States v. Neset, 10 F.Supp.2d at 1115-16.

17. Furthermore, contrary to Szoka's description of our low power licensing regulations, the Commission's technical rules, which, among other things, impose requirements on the power levels of FM stations, are not content-based and, hence, must only be reasonably related to the statutory objectives contained in the Communications Act to pass muster under the First

Amendment. See FCC v. National Citizens Committee for Broadcasting, 436 U.S. at 802; Stephen Paul Dunifer, 11 FCC Rcd at 721 (holding that the rules are reasonable and meet the constitutional standard). For the reasons that follow, we continue to believe that these rules are reasonable.

18. In the Act, Congress mandated that "the Commission shall make such distribution of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio services to each of the same." 47 U.S.C. § 307(b). See also 47 U.S.C. § 303(a)-(d) (Commission shall, as the public interest requires, classify radio stations, prescribe the nature of service to be rendered by radio stations, assign frequencies for stations, and determine locations of stations). In accordance with Congress's directive, and notwithstanding Szoka's claim that the Commission has not met its statutory obligation to efficiently use the radio spectrum in the public interest, the Commission has allotted stations to communities throughout the United States and has assigned their frequency and power levels to accommodate the goals of utilizing the spectrum efficiently, achieving a wide distribution of stations, allowing each station to serve as many people as possible, and allowing numerous stations to be licensed. See Revision of FM Broadcast Rules, Particularly as to Allocation and Technical Standards, 40 FCC 747, 753-57 ¶¶ 15-22 (1963). Moreover, through rulemaking, the Commission has fashioned a licensing system that serves a wide range of conditions and is adaptable to changing circumstances, but which avoids extremes in permissible power. Thus, the Commission curtails low power FM broadcasting because of spectrum efficiency considerations, but we also limit the size of stations and do not permit the highest power possible because that would reduce the number of stations and undermine the Commission's goal of promoting diversity of voices. See Stephen Paul Dunifer, 11 FCC Rcd at 724.

19. The Commission has explained that the rules pertaining to low power broadcast services are reasonably related to our statutory objective of achieving "a fair, efficient, and equitable distribution of radio services" in the United States, pursuant to 47 U.S.C. § 307(b), and are designed to permit the most efficient use of the spectrum. See Stephen Paul Dunifer, 11 FCC Rcd at 721-25 (discussing in detail the history of the Commission's rulemaking proceedings examining the issue of low power broadcasting and the Commission's concerns with matters of signal interference, spectrum efficiency, and preclusion). With regard to Szoka's suggestion that we revisit our rules, we note that the Commission recently adopted a Notice of Proposed Rule Making to explore the possible authorization of new, low power FM radio stations, including the creation of a 100-watt secondary service. See Creation of a Low Power Radio Service, FCC 99-6, at 1. We did so in recognition of the growth in radio ownership consolidation over the past few years as a result of the liberalization of our local radio ownership rules, and in response to the increasing public demand for additional outlets of public expression which could expand the diversity of voices. Id. at 6, 40. In so doing, we stated that we are "mindful of the technical requirements necessary to protect existing radio service and are concerned with preserving the excellent technical quality of radio service available today which

has been fostered and maintained by our existing rules." Id. at 40. The proposed rules are prospective in nature, of course, and are totally separate from the Commission's repeated efforts, as here, to terminate all unlicensed radio operations. Moreover, the Commission has not yet decided whether parties who, like Szoka, have persisted in unlawful broadcast operations, even after Commission officials have issued repeated warnings and the Commission has initiated enforcement action, possess the requisite character qualifications to be eligible for a license in any new radio service. Id. at 27-28.

C. Forfeiture

20. Turning next to Szoka's objections to the assessment of an $11,000 forfeiture for his unauthorized operation, we reject first Szoka's claim that the proposed forfeiture violates the Excessive Fines clause of the Eighth Amendment.[5] To support his position, Szoka cites U.S. v. Bajakajian, 118 S. Ct. 2028 (1998), where the court held that a "punitive forfeiture" is unconstitutional if it is "grossly disproportional" to the gravity of the offense charged. Id. at 2036. Even assuming, arguendo, that a monetary forfeiture imposed by the Commission pursuant to 47 U.S.C. § 503(b) implicates the Eighth Amendment, for the reasons stated below we do not find that the forfeiture ordered by the ALJ in this case is excessive or out of proportion to Szoka's violation of Section 301.

21. We have stated that unlicensed operation of a radio transmitter in violation of Section 301 is a serious violation of the Act. See Madison Communications, Inc., 8 FCC Rcd 1759 (1993); Data Investments, Inc., 6 FCC Rcd 4496 (1991). In determining the forfeiture amount in this case, we have considered the factors set forth in 47 U.S.C. § 503(b)(2)(D), including the nature, circumstances, extent, and gravity of the violations. Szoka has operated his radio station without a license since at least November 1996, and perhaps as early as September 1995, and continues to operate his facility. Moreover, he has been informed explicitly by the Bureau that his unlicensed operation is in violation of the Communications Act. In addition, Szoka has not made any good faith effort to come into compliance with the law even after being told that his transmissions are illegal. Thus his violations are serious, willful, and repeated. Although Szoka argues that his violation of the Act is not willful because he believes he is acting lawfully, we have explained that the term "willful" means that the person "knew he was doing the act in question, regardless of whether there was an intent to violate the law." See Southern California Broadcasting Co., 6 FCC Rcd 4387, 4387-88 (1991) (quoting Conference Report accompanying amendment clarifying definition of willful in 47 U.S.C. § 312(f), which definition also applies

[5] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., Amend. VIII.

to 47 U.S.C. § 503(b)).[6] In these circumstances, we conclude that $11,000 is the appropriate forfeiture amount. This forfeiture is identical to that imposed by the Commission in three other recently concluded show cause proceedings involving similar unauthorized operations of radio stations in violation of Section 301. See Mark A. Rabenold, FCC 98-325, released December 11, 1998; Lewis B. Arnold, FCC 98-326, released December 11, 1998; Keith Perry, FCC 98-327, released December 23, 1998.

22. Additionally we disagree with Szoka that the forfeiture violates other constitutional safeguards. Specifically, in the OSC, Szoka was provided notice and an opportunity for hearing before a Commission ALJ pursuant to 47 U.S.C. § 503(b). Furthermore, the OSC constituted a Bill of Particulars with respect to all issues. Szoka also has been represented by counsel of his choice before the ALJ and the Commission. And Szoka's assertion of his right against self-incrimination is not relevant because this is not a criminal proceeding. See Stephen Paul Dunifer, 11 FCC Rcd at 729 (rejecting similar claims that due process, or Fifth or Sixth Amendment rights were violated in Section 503(b) forfeiture proceeding against unlicensed broadcaster).

23. Finally, Szoka's reliance on SBREFA is unavailing. Section 223 of SBREFA, enacted as part of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), requires agencies to establish a policy providing for the reduction and, where appropriate, the waiver of civil penalties imposed on small entities. As part of this policy, under appropriate circumstances, agencies may consider the entity's ability to pay. In establishing this policy, agencies additionally may consider certain specific conditions and exclusions listed in Section 223. In amending our rules to adopt our forfeiture guidelines, we made clear that our existing policies comply with Section 223 of SBREFA. Thus, under 47 U.S.C. § 503(b)(2)(D) and 47 C.F.R. § 1.80(b)(4), we consider inability to pay as a relevant factor in assessing forfeitures. And our other upward and downward adjustment criteria encompass many of the conditions and exclusions listed in Section 223 of SBREFA. See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Rcd 17087, 17109 (1997) (petitions for recon. pending). In this case, the ALJ correctly noted that, under Section 223(b)(4) of SBREFA, willful violations may be excluded from the policy's applicability, and we note further that, under Section 223(b)(6), requiring good faith efforts to comply with the law may be made a condition of the policy's applicability. In view of Szoka's willful conduct in operating an unlicensed radio station in direct violation of Section 301 and his failure to make any good faith effort to comply with the law, even after being told by the Bureau that the operation was illegal, he cannot look to SBREFA to provide relief from the forfeiture imposed by the ALJ.

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[6] "The term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate" the Act or the Commission's rules. 47 U.S.C. § 312(f).

IV. ORDERING CLAUSES

24. ACCORDINGLY, IT IS ORDERED That, pursuant to 47 U.S.C. § 312(b), Jerry Szoka, and all persons in active concert or participation with him, SHALL CEASE AND DESIST from making unauthorized radio transmissions in violation of 47 U.S.C. § 301.

25. IT IS FURTHER ORDERED That, pursuant to 47 U.S.C. §503(b), Jerry Szoka SHALL FORFEIT to the United States the sum of eleven thousand dollars ($11,000) for willful violation of 47 U.S.C. § 301.[7] Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the Federal Communications Commission, within forty (40) days of the release date of this Decision, to Federal Communications Commission, P.O. Box 73482, Chicago, IL. 60673-7482.

26. IT IS FURTHER ORDERED That a copy of this Decision shall be sent to Jerry Szoka by Certified Mail - Return Receipt Requested.

27. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

[7]A claim of inability to pay should be supported by tax returns or other financial statements prepared under generally accepted accounting principles for the most recent three year period. This information must be submitted within thirty (30) days of the release of this Decision to FCC, Compliance and Information Bureau, Compliance Division, 445 12th Street, S.W., Washington, D.C. 20554.